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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1963

Nos. 849, 850, and 851

INLAND EMPIRE BUILDERS, INC., *et al.*, *Appellants*,

v.

THE STATE OF WASHINGTON, *et al.*,

HEBB AND NARODICK, *et al.*, *Appellants*,

v.

THE STATE OF WASHINGTON, *et al.*,

IAN MURRAY, *et al.*, *Appellants*,

v.

THE STATE OF WASHINGTON, *et al.*

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

REPLY OF APPELLEES TO MEMORANDUM FOR THE UNITED STATES

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I.

ANSWER OF ARGUMENT OF UNITED STATES CONCERNING PUBLIC IMPORTANCE OF THESE CASES

The Appellees find on page seven of the Memorandum of the United States a number of statements

with which we agree completely, and which demonstrate that these cases do not merit review by this Court.

First, the United States admits that it has no direct financial interest in these cases, because it is not obligated to reimburse the contractors for taxes they are required to pay.

Secondly, the United States goes even further and states that the question involved in these cases "* * * does not appear to have great continuing importance" because of the fact that the Capehart program is now "* * * coming to an end."

So far, then, the United States has given only very cogent reasons why these cases are *not* of great public importance and should *not* be reviewed. In its attempt to establish some sort of public importance for these cases, however, the argument of the United States is far from cogent.

The argument of the United States looks far into the future, to a hypothetical day on which Congress might decide to use a Capehart type of financing for some other types of governmental projects. The argument gives no intimation, however, of any projects that might be actually forthcoming, or what sort of projects they might be. But more importantly, it overlooks one important fact, viz., that if and when Congress decides to use a Capehart type of financing again, it can remove any "* * * threat of State taxation" by simply writing this "threat" out of existence.

Congress has the indisputable power to grant immunity from state taxation to private corporations in their dealings with the federal government. *Carson v. Roane-Anderson Co.*, 342 U. S. 232. It has merely to exercise this power in order to preserve a Capehart type of financing program from state taxation. It certainly does not take a decision by this Court to do the job.

It should be noted in passing that Congress has, in fact, used this power in the Capehart program, but only with regard to property taxes upon the leasehold interest of the mortgagor-corporations, and not with regard to sales taxes upon the mortgagor-corporations. (See section 408 of the Act of August 11, 1955, as amended by Section 511 of the Act of August 7, 1956, last proviso.)

Moreover, Congress has not only erected no barrier to state sales taxes, but the contract documents themselves indicate that no barrier exists.

Thus, Paragraph 14 of the Invitation for Bids (Ex. 1, p. IB-4) provides:

> "Nothing in this Invitation for Bids shall be deemed to relieve the eligible builder of any liability for the payment of sales or use taxes properly levied."

And Paragraph 41 (b) of the Housing Contract (Ex. 8, p. HC-27) provides as follows:

> "(b) Except as may be otherwise provided in this Housing Contract, the contract price includes all Federal, State and local taxes and duties in effect and applicable to this Housing Contract on the contract date, except taxes from

which the eligible builder or the transactions or property covered by this Housing Contract are then exempt. Duties and Federal transportation taxes are included in the contract price unless otherwise specifically excluded."

These provisions, drafted by the federal government, hardly manifest an intent on the part of the government that the mortgagor-corporations should be immune from state sales taxes.

The United States presents one other argument on this question of public importance, by stating erroneously on page six of the Memorandum that the highest courts of several other states have disagreed upon the issues presented here. The answer to this argument is two-fold.

Even if the assertion of the United States is correct, any such disagreement can be of little concern to this Court because, as the United States has stated, the Capehart program is ending and therefore any such disagreement is of no great public concern and is unlikely to present any problems in the future. But secondly, and more importantly, the assertion is simply not correct. As pointed out in Appellee's Motion to Dismiss, page twenty-seven, *Knapp-Stiles, Inc. v. Dept. of Revenue*, 370 Mich. 629, 122 N.W. (2d) 642, and *Green v. Eglin AFB Housing, Inc.*, 104 So. (2d) 463, each turned upon the interpretation of particular and peculiar state exemption statutes providing immunity much broader than demanded by the Federal Constitution.[1]

[1] Admittedly, the Michigan and Florida cases both contain *dicta* which appear to support the position of the United States and the Appellants; but the Appellees submit that a disagreement found solely in *dicta* is not the sort of disagreement that merits review by this Court.

On the other hand the only decision of another state Supreme Court expressly turning on the question of whether or not the mortgagor-corporation is a Federal instrumentality supports the decision involved in these appeals. *S. S. Silberblatt, Inc. v. Tax Commission of the State of New York*, 5 N. Y. (2d) 635, 159 N.E. (2d) 195, cert. den. 361 U. S. 912 (1959). (See discussions, Motion to Dismiss, pp. 26-29.)

In other words, every known decision of the highest courts of the several states concerning the application of state taxes to various phases of Capehart housing transactions are in harmony. The United States is thus denied this ground for asserting that a substantial question is presented which merits review of this Court.

II.

ANSWER TO ARGUMENT OF UNITED STATES CONCERNING CORRECTNESS OF DECISION

The Solicitor General has erred in his analysis of the statutes of the State of Washington as interpreted by the Washington Supreme Court. We respectfully submit that these errors deny the validity of the Solicitor's conclusion that these appeals "cannot be dismissed as 'insubstantial.'"

1. The United States asserts that the Supreme Court of Washington erred in upholding the constitutionality of the State Sales Tax "* * *" as applied to these purchases of Capehart housing by

the United States * * *" (Memo for U. S., p. 6.)

However, the Solicitor acknowledges (a) that the mortgagor builder corporation pays the contractor for the costs of construction (p. 2) "* * * from the funds advanced by the lending institution." (p. 3) (b) The Solicitor also acknowledges that the "tax is on the purchaser" (p. 3).

However, the Solicitor refuses to recognize that under the State statutes in question *the purchaser is the person who pays the contractor.* (See Opinion Appendix A Jurisdictional Statement, Cause #849, pp. 9 to 10; Motion to Dismiss, pp. 20-21.)

Under the facts here, the contractor is paid by the mortgagor-corporation from proceeds of the loan to it by the private lending institution. Therefore, the mortgagor-corporation and *not* the United States is the "purchaser" under the state statute in question.

2. The United States says that the tax is imposed upon the United States because of the "ultimate legal consequences."

> "* * * We therefore believe it is sufficient to summarize the ultimate legal consequences of the transactions which take place whenever such housing is constructed. These consequences establish that Capehart housing is purchased by the United States through the medium of the mortgagor-builder corporation." Memo for U. S., pp. 3, 4.

Apparently the "ultimate legal consequences" to which the United States refers are:

(a) The control of the United States over the transactions.

(b) The ultimate repayment of the purchase price by the United States.

(c) The immediate acquisition of title by the United States.

But these three elements were present in *Alabama v. King & Boozer*, 314 U. S. 1, 86 L. ed. 3, 62 S. Ct. 43 (1941), and the United States relied upon these elements in its contention in that case that the United States was the purchaser, but nevertheless failed in its argument. *Alabama v. King & Boozer*, *supra*, is, therefore, dispositive of the question of whether the United States is "purchaser" under state law. See Motion to Dismiss, pp. 18-19.

3. Finally, the United States asserts that mortgagor-corporations are really Federal instrumentalities and that "neither the contractor nor the lending institution has any interest in the further refinements and complications [the mortgagor-corporation] which are superimposed on the basic framework inspired 'solely for governmental purposes' ". (Memo for U.S., p. 2) But it can scarcely be denied that certainly the contractor and the lending institution necessarily profit from the Capehart transactions, and to the extent that they profit they then have a monetary interest in the mortgagor-corporations.

Moreover these mortgagor-corporations were incorporated by the Appellants in Delaware, were capitalized by the Appellants, were qualified to do

business as private corporations in Washington, and had only private parties as officers, incorporators, and stockholders. All of these things were done by the Appellants in order that the Appellants might realize a profit. In short the mortgagor corporations served the Appellants and not simply the United States.

CONCLUSION

For the reasons stated in Appellee's Motion to Dismiss and this Reply to the Memorandum for the United States, these appeals should be dismissed for want of a substantial Federal question meriting review of this Court.

Respectfully submitted,

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